Supreme Court, U.S.
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In The

Supreme Court of the United States

DONALD M. SCHULZ and KATHLEEN E. SCHULZ, trustees of 1980 Schulz Living Trust, as amended; MARGARET ANN SCHULZ LOH and MARTIN J. SCHULZ, trustees of the LMA 1992 Trust; and MARTIN J. SCHULZ, trustee of the 1992 SMJ Trust,

Petitioners,

v.

JASON KING, Nevada State Engineer,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Is it a judicial taking of property without compensation where a state's highest court overrules and invalidates a longstanding rule that changed the law which theretofore prevented the State of Nevada's water law from working a forfeiture of pre-1913 vested water rights by giving a 1967 forfeiture statute retroactive effect and applicability to Petitioner's water rights?

II.

Is the Petitioners' interest in being free from an uncompensated taking of their vested water rights by a Nevada State Engineer's forfeiture proceeding a fundamental right under the Bill of Rights made applicable to the states under the Fourteenth Amendment's Due Process and Equal Protection Clauses, such that a threatened taking by forfeiture requires a greater state interest in a balancing test than that provided for by the rational-basis test to justify the uncompensated taking?

III.

Is it a denial of due process where the Ninth Circuit Court of Appeals has decided numerous forfeiture cases arising in the State of Nevada based on the Court's analysis of what the United States Constitution requires and the Court's "painstakingly

QUESTIONS PRESENTED – Continued

established" equitable rules where the Nevada Supreme Court countermands those decisions resulting in an uncompensated taking of Petitioners' water rights?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of the petition is as follows:

Plaintiffs-Appellants and Petitioners: Donald M. Schulz and Kathleen E. Schulz, trustees of the 1980 Schulz Living Trust, as amended; Margaret Ann Schulz Loh and Martin J. Schulz, trustees of the LMA 1992 Trust, EIN 36-7075239; and Martin J. Schulz, trustee of the 1992 SMJ Trust, EIN 36-7075222. Martin and Margaret Ann are the children of Donald M. and Kathleen E. Schulz. They will be collectively referred to as the Schulz Family.

Defendant-Appellee and Respondent: Jason King, in his official capacity as the Nevada State Engineer, the successor in office to the initial defendant, Tracy Taylor. He is also the administrative director of the Nevada Division of Water Resources. He administers the chapters of Nevada Statutes, Chapters 532, 533 and 534, commonly known as Nevada water laws and sections of Chapter 278. He will be referred to as the State Engineer.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Donald M. Schulz and Kathleen E. Schulz, trustees of 1980 Schulz Living Trust, as amended; Margaret Ann Schulz Loh and Martin J. Schulz, trustees of the LMA 1992 Trust; and Martin J. Schulz, trustee of the 1992 SMJ Trust, respectfully petition for a writ of certiorari to review the opinion and judgment of the Supreme Court of Nevada contained in its Order of Affirmance entered on June 22, 2010 and the Order Denying Rehearing entered on September 3, 2010.

OPINIONS BELOW

The opinion of the Nevada Supreme Court whose judgment is sought to be reviewed, denominated Order of Affirmance, is reproduced at pp. 1 to 11 of the Appendix. It is unreported. The Order Denying Rehearing is reproduced at pp. 20-21 of the Appendix. The Order Granting Writ of Mandamus and Denying Motion for Summary Judgment and Declaratory Relief of the First Judicial District Court of the State of Nevada entered on February 14, 2008 is not reported. It is set forth in the Appendix at pp. 12 to 19.

JURISDICTION

The Order of Affirmance of the Nevada Supreme Court was entered on June 22, 2010. The Order Denying Rehearing was entered on September 3,

2010. The petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rule13.3 because it is being filed within 90 days after the denial of a timely petition for rehearing. This Court has jurisdiction to review the judgment of the Nevada Supreme Court pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS AND APPLICABLE STATUTES

The Fifth Amendment of the United States Constitution is set forth in pertinent part as follows:

> . . . [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the United States Constitution is set forth in pertinent part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Nev. Const. Art. 1, 8, cl. 5 provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Nev. Const. Art. 1, 8, cl. 6 provides:

> Private property shall not be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made.

The following Nevada Revised Statutes are involved in this petition:

NRS 533.035
NRS 533.040
NRS 533.060(2)
NRS 533.085
NRS 533.325
NRS 533.345
NRS 533.370(3)
NRS 533.450
NRS 534.090
NRS 534.090(1)
NRS 534.100
Section 8 of the Act of 1913, N.C.L. §7897
Section 84 of the Act of 1913, N.C.L. §7970

These statutes are reproduced in the Appendix, pp. 22 to 35.

STATEMENT OF THE CASE

The Schulz Family trustees are the owners of underground water rights which were perfected between 1855 and 1913 under the common law doctrine of prior appropriation. They are in the nature of

real property interests subject to the right of eminent domain under Nevada law. *See, e.g., Carson City v. Estate of Lompa*, 8 Nev. 541, 542, 501 P.2d 662 (1972).

The Schulz Family are the descendants of a pioneer family that settled on a ranch located south of the State capitol, Carson City, in section five of township fourteen north, range twenty east, Mount Diablo Meridian, in Nevada surveyed as Recorded Survey 321. A part of what would be included in RS 321 was originally settled in 1855 by a man named Huff who hand dug a large pit type well which was used to supply water to the emigrants on the Emigrant Trail[1] and grow forage and produce. He broke up the soil and cultivated approximately 19 acres. Huffs house was depicted on an 1861 Butler Ives map. The map shows Huffs House located at the crossroads of a number of early roads and trails, one of which was the well traveled Emigrant Trail.

Samuel Small was the successor to Huff from 1863 to 1876. Small continued the sale of water to travelers on the emigrant wagon road until 1876

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[1] The National Military Archive in Washington, D.C. contains a document describing the federal survey of the 1853 wagon road which traversed RS 321 from north to south. The military archives also documented the construction of hand dug wells. The Surveyor General, an official in the U.S. Department of Interior, directed that such wells were to be constructed one day journey apart along the wagon road or approximately every 15 miles. These well sites can be found to this day.

when John R. Schulz, took possession from Samuel Small.

John R. Schulz, Donald M. Schulz' grandfather, filed Homestead Application Number 265 with the Land Office at Carson City on November 25, 1876 and acquired a U.S. Land Patent (No. 133) to 160 acres of land under the Homestead Act of 1862 on November 10, 1882 on RS 321. The United States granted the public domain lands comprising the Schulz homestead with appurtenances " . . . subject to any vested and accrued water rights for mining, agriculture, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, . . . " John R. Schulz stated in an affidavit that he had 30 acres of land under cultivation in 1882. John R. Schulz used both groundwater and surface water for crops of oats, alfalfa and vegetables. Between 1883 and 1892 John R. Schulz expanded his cultivated lands to 128.47 acres as attested to in his sworn affidavit and claim filed with the Nevada State Legislature in 1890.

Three wells were developed on the Schulz homestead, a domestic well serving the residence, the windmill well and the original hand-dug well which family tradition and records describe the water level as being at the surface of the ground. The windmill well and hand-dug well served irrigation purposes. In 1882 and the ensuing decades, John R. Schulz placed his vested groundwater rights to beneficial use by

means of a system of wells, pipes, a windmill, ditches and reservoirs. He used the wells and windmill to store water in a tower and a land reservoir and used pipes and ditches to convey the water throughout the homestead and beyond to a 20 acre parcel owned by a neighbor. Pastures were irrigated which supported sheep, beef livestock, horses and dairy cows. Alfalfa and grains were produced for winter feed. John R. Schulz also relied on groundwater to serve the needs of bands of ewes, lambs and rams which he grazed in the Bridgeport, California area from May to October and at the Schulz Ranch from November to April.

In 1935, John R. Schulz, died and the First Judicial District Court in Douglas County had jurisdiction over his estate until in 1969 the homestead was surveyed, parceled, and distributed to his heirs.

From 1936 to 1985, John R. Schulz sons and daughters operated parts of the ranch for cow and calf programs, horse programs, lambing operations, and under lease to produce providers and other users. Between 1985 and 1992, the Schulz Family acquired thirty-five acres from other members of the larger Schulz family where the ranch house and wells were located and consolidated their interests in the Schulz Family Trusts.

In 1969, the Schulz ranch was subjected to a change of zoning as the result of a change in the county boundary line between Douglas County and Carson City which put the ranch in Carson City where the zoning was single family one-acre instead

of agricultural. The change of zoning caused the surviving descendants of John R. Schulz to pursue for decades, a search for changes in the manner of use of their water rights. In 1985, Donald M. Schulz began an effort to prove and quantify the vested water rights appurtenant to the Schulz ranch with the Nevada Division of Water Resources. In 1988, then State Engineer, Peter Morros, advised Donald M. Schulz to prepare and file proofs of appropriation for his claims of vested groundwater rights. After an exhaustive document search and research project, in 1991 Donald M. Schulz filed proofs of appropriation in the State Engineer office which were given numbers 05249, 05250, 05251, 05252, 05253, 05254, and 05256. The proofs of appropriation claimed 611 acre feet of groundwater plus 40 acre feet of groundwater storage rights. These proofs were eventually acknowledged by the State Engineer's office in a letter dated August 11, 1998 containing summaries of ownership.

In 1986, Donald M. Schulz applied to Carson City for approval to restore agricultural use after the City had denied a zoning change application for a mobile home park zoning. The City denied the 1986 application for a change in zoning. Thereafter he attempted, without success because of adverse land use management decisions by Carson City, to establish a hog raising operation, a bottled water operation, and a planned unit development (PUD). From 1991 to 2005, Donald M. Schulz, on behalf of the family trusts,

pursued the sale of the groundwater rights to local municipalities.

In 1991, Donald M. Schulz contracted for the drilling of a new 517 foot deep well which established the extent of the basin-fill aquifer in the immediate area. Engineering studies of the well were reported on February 24, 1992 by the driller, Kleinfelder, Inc., which quantified the capacity of the well at over 650 gallons per minute or more than 1046 acre feet per year on a sustainable basis. On July 13, 1996, Donald M. Schulz caused Application No. 62211 to be filed with the Division of Water Resources to transfer the point of diversion from the location of the hand dug well site to the replacement well site and the manner of use from irrigation to quasi-municipal, which encompassed the water rights claimed in the proofs of appropriation. The application was never acted upon.

In October of 2005, the Schulz Family entered into a contract of sale of their vested groundwater rights with Carson City styled Water Purchase Agreement. App. 13. The Consolidated Municipality of Carson City agreed to purchase up to 611 acre feet of water rights owned by the Schulz Family or a quantity approved for transfer by the State Engineer. *Id.* The Carson City Board of Supervisors approved the Water Purchase Agreement and a subdivision map for a 521-unit residential subdivision known as the Schulz Ranch Development on October 20, 2005. *Id.* On November 3, 2005, the Board of Supervisors gave final approval of master-plan and zoning

amendments which authorized the 521-unit Schulz Ranch Residential Subdivision. *Id.*

On January 3, 2006, the Schulz Family conveyed their ranch land, exclusive of the water rights, by a grant, bargain and sale deed to Schulz Ranch Developers, LLC, a Nevada limited liability company. The conveyance was subject to the Water Purchase Agreement.

In order to consummate the Water Purchase Agreement, the Schulz Family filed applications with the Nevada Division of Water Resources on January 26, 2006 to change the manner and place of use of their groundwater rights pursuant to NRS 533.040 (App. 22), NRS 533.325 (App. 24), and NRS 533.345 (App. 24-25). App. 13. These applications were ready for action on November 4, 2006, but no action was taken. *Id.* The Schulz Family was advised by staff engineers at the Division of Water Resources that the applications would not be acted upon until their water rights had been adjudicated and no adjudication was planned. *Id.* The Schulz Family was forced to retain an attorney which resulted in the filing of a complaint with the District Court.

1. District Court Decision

The Schulz Family filed their Complaint on July 13, 2007 seeking to invoke the equity jurisdiction of the Court to provide them with a decree quieting title to their water rights and for declaratory relief, a writ of mandamus and injunctive relief to the extent

necessary and proper to effect the Court's equity jurisdiction. The Complaint was timely answered by the State Engineer. In his Answer, the State Engineer averred that the Schulz Family water rights were from a defined aquifer, a determination he was empowered to make pursuant to NRS 534.100(1) (App. 33-34). The State Engineer alleged as his second affirmative defense that all or part of the water rights claimed by Plaintiffs have been forfeited through non use. The Schulz Family's motion to strike this defense, and others was denied.

On January 4, 2008, the Schulz Family filed Plaintiffs' Motion for Partial Summary Judgment, Writ of Mandamus and Declaratory Relief together with a memorandum of points and authorities and the affidavit of Donald M. Schulz in support of their motion. App. 12. The unchallenged affidavit of Donald M. Schulz established the nature and history of the water rights and the Schulz Family chain of title. The Schulz Family requested a declaratory judgment that NRS 534.090(1) (App. 30-32) was not applicable to their water rights and/or was an unconstitutional denial of due process and equal protection that would result in an unconstitutional taking of property without compensation. The State Engineer filed an opposition to the Schulz Family's motion on February 1, 2008 and a reply was filed by the Schulz Family on February 12, 2008. The District Court filed and entered its Order Granting Writ of Mandamus and Denying Motion for Summary Judgment and Declaratory Relief on February 14, 2008. App. 12-19.

The District Court's February 14, 2008 Order granted the Schulz Family motion for a writ of mandamus. App. 18. The writ mandated that the State Engineer produce an order of determination of the relative rights to groundwater in an area that encompassed the point of diversion of the asserted Schulz Family vested groundwater rights and provide appropriate notice to potential claimants in such area. *Id.* The State Engineer was further directed to include in the order of determination, a determination of the validity of the water rights being asserted by the Schulz Family, the amount of the water rights the Schulz Family was entitled to, the priority of the water right, and whether the water right if vested had been abandoned or forfeited under the provisions of NRS 534.090 (App. 30-33). App. 18.

The Order put the Schulz Family's vested water rights in jeopardy by the Draconian penalty of forfeiture for a five year period of non use. App. 18. The Schulz Family had long understood that their pre-1913 water rights were protected from forfeiture under what has become known as the Rule of *Manse Springs* after the Nevada Supreme Court case that established the rule, *In Re Waters of Manse Springs,* 60 Nev. 280, 108 P.2d 311 (1940). The rule has been relied on in numerous federal court cases and was reaffirmed by the Nevada Supreme Court in *Andersen Family Assocs. v. State Engineer,* 124 Nev. 182, 189, 179 P.3d 1201, 1205 (2008). In holding that the Nevada groundwater forfeiture statute was constitutional and retroactively applicable to the Schulz

family water rights, the District Court relied on *Town of Eureka v. State Engineer,* 108 Nev. 163, 826 P.2d 948 (1992), a case that dealt with an administratively permitted groundwater right (108 Nev. at 168, 826 P.2d at 951) established in 1967. App. 16-17.

2. Nevada Supreme Court Decision

On appeal to the Nevada Supreme Court, the Schulz Family argued that the district court erred in determining (1) that the forfeiture statute, NRS 534.090(1), is retroactively applicable to its vested water rights, and (2) that NRS 534.090(1) is constitutional. App. 2. The Nevada Supreme Court reviewed the retroactive application of 534.090(1) and its constitutionality de novo. App. 3, 6.

The Court stated that:

> In *Manse Spring*, we considered the earliest form of the forfeiture statute, which did not make specifications for groundwater. *Id.* at 285-86, 108 P.2d at 314. We held that subjecting water rights acquired before 1913 to forfeiture would impair those rights, in violation of a protective measure stating that vested rights should not be impaired by provisions of the water act. *Id.* at 289, 108 P.2d at 315-16. Accordingly, rights acquired before 1913 could only be lost in accordance with the law in existence at the time of the enactment of said 1913 statute, namely,

> intentional abandonment. *Id.* at 289, 108 P.2d at 316.

App. 4-5. The Court avoided the Rule of *Manse Springs* by concluding that the Nevada Legislature amended NRS 534.090(1) in 1967 to subject both determined and undetermined water rights to forfeiture (App. 4), but it is precisely this result that the Rule of *Manse Springs* prohibited.

The Court disregarded the Schulz Family's arguments that there is no legal distinction between the classification of their water rights and the classification of the spring water rights that were considered in *Manse Springs, supra,* and that the water laws that were applied to the spring water rights in *Manse Springs* were the same laws that should be applicable to Schulz water rights.

The Nevada Supreme Court's failure to recognize a factual or legal basis to distinguish the Schulz Family pre-1913 water rights from the *Manse Springs* water rights was a departure from prior case law and changed the law of forfeiture applicable to water rights such as those of the Schulz Family. The Schulz Family argued that the result was a judicial taking of such rights without compensation in violation of the Fifth Amendment to the United States Constitution as made applicable to the states under the Fourteenth Amendment. They also argued that the administrative forfeiture procedure directed by the District Court was an unconstitutional delegation

of judicial power to an administrative officer and NRS 534.090(1) was a bill of attainder.

The Court affirmed the District Court's reliance on *Town of Eureka v. State Engineer, supra,* in holding that NRS 534.090(1) was constitutional and retroactive to the class of water rights held by the Schulz Family even though *Town of Eureka* dealt with a distinguishable class of permitted water rights to percolating water. App. 6.

In footnote 1 of the Order of Affirmance, the Nevada Supreme Court stated:

> Appellants also contend that NRS 534.090(1) affects [sic] an unconstitutional taking and is an unconstitutional bill of attainder. After careful review, we conclude that these arguments lack merit.

App. 2-3. The Court's statement effectively disregarded the important constitutional provisions it referred to.

The Court rejected without comment the Schulz Family's due process arguments in the petition for rehearing that recent decisions of this Court provide that enumerated rights in the Bill of Rights are incorporated in the due process provisions of the Fourteenth Amendment. *See, McDonald, et al. v. City of Chicago, et al.,* 561 U.S. ___, 130 S.Ct. 3020 (2010). The Schulz Family argued that such inclusion includes the Fifth Amendment right to be free from an uncompensated taking of property and that the right as incorporated in the Fourteenth Amendment was

recognized as a fundamental right requiring a higher scrutiny than the rational-basis analysis applied by the Nevada Supreme Court. App. 7-10. The Nevada Supreme Court held that the Nevada Legislature had a rational basis in the concept of beneficial use[2] to enact legislation in 1967 that would work a retroactive taking of the Schulz Family water rights without the requirement for compensation. App. 7-9. The Nevada Supreme Court disregarded the fact that the Schulz Family's ancestor had no duty to continue beneficial use of his water rights when they were

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[2] The Nevada Supreme Court misconstrued the scope and purpose of beneficial use in the statutes. Nevada made a transition from an early possessory theory of water rights characterized by a diversion coupled with an intent to use the water to a theory based almost solely upon an actual application of water to a specific beneficial use. Under the early possessory theory, the carrying capacity of the ditch rather than beneficial use was considered the measure of the water right The problem experienced with the carrying capacity of the ditch as a measure of the right was that there was the danger of a "dog in the manger" problem, that is, an appropriator could lay claim to water that was not and often could not be put to use, but nevertheless was unavailable to others because of the size of his ditch. The final phase of this transition was effected by the Act of March 22, 1913. NRS 533.035, enacted originally as Section 3 of the 1913 act, provided that beneficial use shall be the basis, the measure and the limit of the right to the use of water. The emphasis shifted from the act of diversion to the actual placement of the water to beneficial use as the act which perfected the right. *See, e.g., State v. State Engineer,* 104 Nev. 709, 714, 766 P.2d 263, 266-267 (1988) Section 8 of the 1913 act (N C.L. 897), the first forfeiture provision, speaks in terms such as "irrespective of the carrying capacity of the ditch." Beneficial use was not enacted as a retroactive constraint on the vested Schulz Family water rights. *See* Section 84 of the 1913 act (N.C.L. 970, codified as NRS 533.085). App. 23-24

established and confirmed by the federal land patent because beneficial use was not a legal concept until the act of 1913. The Court declined to recognize that thereafter, forfeiture for non use was protected by the non-impairment provision of the act of 1913, Section 84, discussed in the case of *Manse Springs*, *supra*.

The Nevada Supreme Court also disregarded the Schulz Family reliance on a line of cases from the Ninth Circuit Court of Appeals that have uniformly recognized that pre-1913 water rights are not subject to forfeiture and have held that where government thwarts the water user's efforts to obtain permits so that continued beneficial use may be maintained, the forfeiture statutes are inapplicable based on equitable considerations.

A timely filed petition for rehearing to the Nevada Supreme Court was denied without comment on September 3, 2010. App. 20.

REASONS FOR GRANTING THE WRIT

1. The Nevada Supreme Court's Order of Affirmance Changed the Law Which Had Been Applied to the Question of Forfeiture of Pre-1913 Vested Water Rights in an Unanticipated and Unpredictable Manner Resulting in an Uncompensated Judicial Taking of the Schulz Family's Vested Pre-1913 Water Rights.

In this case the State of Nevada, acting through its three branches of government, imposed the

extreme penalty of forfeiture based solely upon inactivity of the owner of a vested property right. The state actors that the Schulz Family contends participated in the unconstitutional taking of their water rights include the Legislature, the executive in the person of the State Engineer, the District Court and the State Supreme Court. This case, however, is primarily one dealing with a judicial taking by the Nevada Supreme Court as it was the province of that Court to apply relevant constitutional analysis and, indeed, its own precedents, in the avoidance of a threatened uncompensated taking of property.

This Court in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection,* 560 U.S. ___, ___, 130 S.Ct. 2592, 2601 (2010) stated recently:

> Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary.
>
> * * *
>
> If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation. "[A] State, by *ipse dixit*, may not transform private property into public property without compensation." *Ibid.*

The scenario described by this Court is precisely what transpired as the result of the Nevada Supreme

Court's Order of Affirmance. Unlike *Stop the Beach Renourishment*, however, this is a case where the judicial taking stands out in bold relief and provides this Court with an appropriate reason to clarify and build on its takings jurisprudence.

The Nevada Supreme Court's Order of Affirmance (App. 18) has laid the basis for the State Engineer to transform the Schulz Family's vested private property rights into public property through an administrative proceeding which, if appealed, would heavily favor the State Engineer's ruling, in effect become a *fait accompli*. *See* NRS 533.450 (App. 27-30). Furthermore, the State Engineer is not permitted to provide equitable relief administratively. *See, e.g., State Engineer v. American Nat. Ins. Co.*, 88 Nev. 424, 426, 498 P.2d 1329, 1330-1331 (1972).

The Nevada Supreme Court's Order of Affirmance was the product of a serious misapprehension of the interplay of constitutional principles with Nevada water law. The Nevada Supreme Court erred by failing to recognize that Schulz Family water rights came within the regulation provided by the 1913 water act and, particularly, the nonimpairment provision, Section 84 of the act. App. 4-6. In *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972) this Court stated that:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state

> law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

The fact that the Schulz Family water rights are vested pre-1913 water rights was not contested in the District Court or the Nevada Supreme Court proceedings but their dimensions were improperly defined so they were denied important protections that stem from state law-rules and understandings. In *Strait v. Brown*, 16 Nev. 317, 321 (1881), the Nevada Supreme Court stated with respect to pre-1913 water rights:

> It has been conclusively established by a long line of decisions that percolating water existing in the earth is not governed by the same laws that have been established for running streams. No distinction exists in the law between waters running under the surface in defined channels and those running in distinct channels upon the surface. The distinction is made between all waters running in distinct channels, whether upon the surface or subterranean, and those oozing or percolating through the soil in varying quantities and uncertain directions. The grounds for the distinctions are clearly pointed out in the authorities.

The Nevada Supreme Court chose to disregard its own precedents that recognize that the laws that were applied to the spring water rights in *Manse Springs* were the same laws that are applicable to Schulz water rights. The Schulz water rights, being from a definable aquifer, were in the same

classification as surface water and, consequently, subject to regulation by the Act of March 22, 1913.

NRS 534.100(1) (App. 33-34) provides in part:

> Existing water rights to the use of underground water are hereby recognized. For the purpose of this chapter a vested right is a water right on underground water acquired from an artesian or definable aquifer prior to March 22, 1913, and an underground water right on percolating water, the course and boundaries of which are incapable of determination, acquired prior to March 25, 1939.

The Act of March 22, 1913 was the first expression of statutory law applicable to the Schulz Family water rights.

Recent decisions of the Nevada Supreme Court continue to recognize the vested pre-statutory nature of water rights such as the Schulz water rights. In *Andersen Family Associates v. State Engineer, supra,* 124 Nev. at 188, 179 P.3d at 1204, the Nevada Supreme Court stated:

> In Nevada, there are three different types of water rights: vested, permitted, and certificated. First, vested rights are those that existed under Nevada common law before the provisions currently codified in NRS Chapter 533 were enacted in 1913. These rights may not be impaired by statutory law . . . Second, permitted rights refer to rights granted after the State Engineer approves a party's application for water rights. Such permits grant

> the right to develop specific amounts of water for a designated purpose. Third, certificated rights are statutory rights granted after a party perfects his or her permitted water rights. In order to perfect permitted water rights, an applicant must file proof of beneficial use with the State Engineer. Once proof has been filed, the State Engineer will issue a certificate in place of the permit.

In footnote 13, the Court cited a leading Nevada case, *Ormsby County v. Kearney*, 37 Nev. 314, 352-353, 142 P. 803, 810 (1914) as support for its classification of water rights. Justice Norcross writing for the Nevada Supreme Court in *Ormsby County*, 37 Nev. at 352, 142 P. at 810 stated that [t]he whole scope and purpose of the act [of March 22, 1913] show that it was intended to apply to all water rights, whether acquired before or after its adoption.

Whether or not the Schulz Family water rights were classified as surface water rights or groundwater rights is not controlling from a constitutional perspective as they were, in either case, vested pre-1913 property rights. The Nevada Supreme Court, citing to *Manse Springs*, stated in its Order of Affirmance:

> We held that subjecting water rights acquired before 1913 to forfeiture would impair those rights, in violation of a protective measure stating that vested rights should not be impaired by provisions of the water act. *Id.* at 289, 108 P.2d at 315-16. Accordingly, rights acquired before 1913 could only

> be lost in accordance with the law in existence at the time of the enactment of said 1913 statute, namely, intentional abandonment. *Id.* at 289, 108 P.2d at 316.

App. 4-5. Section 84 of the 1913 water act (App. 35) was enacted by the Nevada Legislature as a precaution against the possibility of an unconstitutional divesting of vested rights which would result from the application of the forfeiture provision in Section 8 of the act (App. 34-35). *In Re Waters of Manse Springs, supra,* 60 Nev. at 288-289, 108 P.2d at 315-316. Nevertheless, the Nevada Supreme Court abandoned its previous precedents and disregarded constitutional provisions of the United States and Nevada constitutions which had been raised and discussed in the Schulz Family briefs and at oral argument. The result is a judicial taking of their property because the forfeiture of their water rights is the functional equivalent of an uncompensated taking.

The Rule of *Manse Springs* was a rule of constitutional law that, as pointed out, was established by the Nevada Supreme Court in avoidance of the possibility of an uncompensated taking of property. In this case the Court placed total reliance on an amendment of the forfeiture provision, Section 8 of the 1913 act, in 1967 which resulted in NRS 534.090(1). App. 3-6.

Notwithstanding questions of constitutionality, NRS 534.090(1), as enacted in 1967 lacked the specificity to impart notice that the law had changed. Nowhere in the literature or statutes from other

jurisdictions have the terms "determined and undetermined" been used to describe classes of water rights. An attempt to relate the classes of water rights, vested, permitted and certificated to determined or undetermined results in unreconcilable inconsistencies, particularly as they first appeared in the 1947 statute. *See* App. 3-4. The words are hopelessly vague despite the Nevada Supreme Court's interpretation that they subjected all groundwater rights to forfeiture. App. 4. Prior to the Nevada Supreme Court's Order of Affirmance, reliance was justifiably placed by the Schulz Family on the Rule of *Manse Springs* and Ninth Circuit Court of Appeals cases (discussed, *infra*) that had held that pre-1913 water rights were not subject to forfeiture.

There is ample reason to expect that uncompensated takings of other Nevada pioneer families' water rights will arise repeatedly, unless this case is reviewed and resolved according to constitutional principles by this Court. Such families will have no inkling that their property rights may be in jeopardy by a change in law as the Order of Affirmance was not reported. At the present time hundreds of applications are pending involving the Southern Nevada Water Authority's proposed acquisition of hundreds of thousands of acre feet of water presently held by eastern Nevada ranchers for transfer to the Las Vegas Valley. *See Great Basin Water Network, et al. v. State Engineer, et al.*, 126 Nev. ___, 234 P.3d 912 (2010). The Water Authority has an obvious interest in being able to acquire as much water as it can

without having to pay for it. Even assuming there may be a purported public benefit, compensation for the public benefit must be made if private rights are taken to produce it.

Sixteen of nineteen western states have forfeiture statutes applicable to the appropriation of water rights. 2 W. Hutchins, Water Rights in the Nineteen Western States 290-298 (1974). *See also, Town of Eureka, supra*, 108 Nev. at 167, 826 P.2d at 951. Unless reversed, this case may presage the wielding of an instrument of oppression in many states that share Nevada's scheme of water resource administration, a possibility that would likely be brought to this Court's attention, repeatedly, until resolved on appropriate constitutional grounds.

2. The Nevada Supreme Court's Order of Affirmance Applied the Rational-Basis Test for its Takings Analysis in Disregard of this Court's Recent Decisions that Recognize a Fundamental Right to be Free from an Uncompensated Taking of Property.

The Nevada Supreme Court's Order of Affirmance adversely implicates the exercise of the core functions of this Court. It challenges this Court's fundamental duty to say what the law requires with regard to important federal constitutional issues and this Court's interest in due respect for its construction of federal constitutional law. While the Nevada Supreme Court is competent to characterize Nevada law, when that characterization violates the United

States Constitution with far reaching consequences, it is deserving of review.

This is not a case in which the Nevada Supreme Court reached its result through erroneous factual findings. The errors of fact and improper inferences were incidental to the Court's failure to apply established rules of constitutional law.

The Nevada Supreme Court's Order of Affirmance has decided important federal constitutional questions in a way that conflicts with relevant decisions of this Court, particularly those that pertain to the threatened taking of property without compensation. The fundamental nature of this right is made apparent by this Court's recent cases and has important implications for due process and equal protection as well. The Nevada Supreme Court rejected this Court's recent pronouncements, particularly in its denial of the petition for rehearing without comment. App. 20.

This Court addressed limitations to police power regulatory takings in *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160 (1922) as follows:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions on the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208

> U.S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

In *District of Columbia v. Heller*, 553 U.S. ___, 128 S.Ct. 2783, 2817-2818 (2008), this Court held with respect to a ban on hand guns:

> . . . [T]he inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," 478 F.3d, at 400, would fail constitutional muster.

In footnote 27 of *Heller* this Court rejected the rational-basis level of scrutiny connected with the foregoing

passage. This Court held in footnote 27 that, like the right to bear arms, other enumerated constitutional rights in the Bill of Rights were fundamental rights. The Nevada Supreme Court failed to consider the law announced in *Heller,* and adopted a rational-basis test in its Order of Affirmance. App. 8-9.

On June 30, 2010, this Court handed down a second gun control opinion, *McDonald, et al. v. City of Chicago, et al.,* 561 U.S. ___, 130 S.Ct. 3020 (2010). In *McDonald*, this Court held that the right to bear arms is a fundamental right and struck down the Chicago gun control ordinances. The Fifth Amendment right to be free from an uncompensated taking of property is also a fundamental right under the reasoning applied to gun control ordinances that threatened to restrict the right to keep and bear arms. In *McDonald,* this Court incorporated the fundamental enumerated rights of the first ten amendments in the Fourteenth Amendment Due Process Clause. Justice Alito wrote in the opinion for the plurality at 130 S.Ct. 3031:

> In the late 19th century, the Court began to consider whether the Due Process Clause prohibits the States from infringing rights set out in the Bill of Rights. *See Hurtado v. California,* 110 U.S. 516 (1884) (due process does not require grand jury indictment); *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897) (due process prohibits States from taking of private property for public use without just compensation).

Justice Harlan, writing for the Court in *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 237-238, 17 S.Ct. 581, 585 (1897), stated:

> In the early case of *Gardner v. Newburgh*, 2 Johns. Ch. 162, there being no provision in the Constitution of the State of New York on the subject, Chancellor Kent said that it was a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice, that fair compensation be made to the owner of private property taken for public use.

In *McDonald*, Justice Alito wrote at 130 S.Ct. 3032:

> Thus, in holding that due process prohibits a State from taking private property without just compensation, the Court described the right as "a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice." *Chicago, B. & Q. R. Co. v. Chicago, supra*, at 238, 17 S.Ct. at 581.

Justice Harlan in *Chicago, B. & Q. R. Co., supra,* laid the basis for recognition of the fundamental nature of the protection against an uncompensated taking at 166 U.S. 238-239, 17 S.Ct. at 585-586:

> In *Scott v. Toledo*, 36 Fed. Rep. 385, 395-396, the late Mr. Justice Jackson, while Circuit Judge, had occasion to consider this question. After full consideration, that able judge said:

"Whatever may have been the power of the States on this subject prior to the adoption of the Fourteenth Amendment to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the States cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner, and that any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the State, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly, through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that 'due process of law' required by said amendment. The conclusion of the court on this question is that, since the adoption of the Fourteenth Amendment, compensation for private property taken for public uses constitutes an essential element in 'due process of law,' and that, without such compensation, the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the federal constitution."

The determination whether an enumerated right such as the Fifth Amendment protection against an uncompensated taking of property is a fundamental right was answered by necessary inference in *McDonald*, 130 S.Ct. at 3036, of Justice Alito's opinion as follows:

> With this framework in mind, we now turn directly to the question whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. In answering that question, as just explained, we must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty, *Duncon,* 391 U.S. at 149, 88 S.Ct. 1444, or as we have said in a related context, whether this right is "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg,* 521 U.S. 702, 721, 117 S.Ct. 2302 (1997) (internal quotation marks omitted).

The right to be free from an uncompensated taking of property, like the right to bear arms is fundamental to our ordered liberty consistent with the authorities discussed above.

The Nevada Supreme Court summarily rejected the constitutional principles contained in *Pennsylvania Coal Company, supra, Chicago, B. & Q. R. Co., supra*, and *Heller, supra,* which were confirmed in *McDonald, supra,* relating to the fundamental nature of the enumerated right to be protected from an uncompensated taking of property and the

incorporation of such right in the Fourteenth Amendment. App. 20.

The Fifth Amendment enumerated right to be free from an uncompensated taking of property for public use warrants substantive and procedural due process protection under the Due Process Clause of the Fourteenth Amendment. The Nevada Constitution in Article 1, Section 8, cl. 6, goes further and provides that private property shall not be taken for public purposes without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made. It too defines a fundamental right that is linked to the Nevada Constitution's due process clause, Article 1, Section 8, cl. 5. Where the legislation in question, in this case NRS 534.090(1), is applied to the Schulz Family's vested pre-1913 water rights, it infringes an enumerated, fundamental right and threatens an unconstitutional taking of vested water rights without compensation. The application of the statute cannot survive constitutional muster under the level of scrutiny announced in *Heller* and *McDonald*.

The Nevada Supreme Court rejected this Court's recent analysis that prevents the utilization of the rational-basis test for substantive due process analysis in the context of the potential forfeiture of the Schulz Family water rights. The Nevada Supreme

Court stated at page 7, lines 7-10 of its Order (App. 9) that:

> The statute is rationally related to the legitimate governmental interest of regulating a limited natural resource to its active beneficial uses and does not violate appellants' due process rights.

Under the teachings of the *McDonald* case, the rational-basis scrutiny is inapplicable. The Nevada Supreme Court stated at page 6, lines 17-21 of its Order of Affirmance:

> In *Town of Eureka*, we stated that the constitutionality of retroactive application of a law depended on "a balance between vested property rights and the police power of the State. Water rights are subject to regulation under the police power as is necessary for the general welfare." *Id.*

App. 8. This balancing approach was repudiated in *McDonald* at 561 U.S. ___, ___, 130 S.Ct. 3047 where Justice Alito wrote:

> In *Heller,* however, we expressly rejected the argument that the scope of the Second Amendment rights should be determined by judicial interest balancing. 554 U.S. at ___, 128 S.Ct. at 2820, 2821, and this Court decades ago abandoned the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of

> Rights. *Malloy, supra,* at 10-11 (internal quotation marks omitted).

Justice Alito wrote further in his opinion at 130 S.Ct. 3050:

> Finally Justice Breyer is incorrect that incorporation [of enumerated rights in the Due Process Clause] will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise. As we have noted, while his opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion. See, *supra* at 3046-3047. "The very enumeration of the right takes out of the hands of government even the Third Branch of Government the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller, supra*, at ___, 128 S.Ct. at 2821.

The Schulz Family discussed *Heller* in their briefs on the merits and both *Heller* and *McDonald* in their Petition for Rehearing, but the Court failed to consider, reconsider or misapprehended the significance of the law announced in these cases.

The Nevada Supreme Court also denied equal protection of the law. In 1999, the Nevada Legislature repealed the forfeiture provision, NRS 533.060(2) as to surface water. App. 22-23. The fact that underground water from a defined aquifer has historically been aligned with surface water, it was a denial of

equal protection for a forfeiture provision to be asserted against the Schulz Family water rights when it has been repealed as to their functional equivalent, surface water rights. The Nevada Supreme Court ruled that equal protection was not violated because there was a rational basis for disparate treatment, a test that has been rejected by this Court as to the fundamental right implicated. App. 9-10.

3. The Nevada Supreme Court's Order of Affirmance Disregarded Numerous Federal Court Cases Which Provided Constitutional Protection to Pre-1913 Nevada Water Rights from Forfeiture and Thereby Created a Conflict with Those Cases.

For the past two decades, the Pyramid Lake Paiute Tribe in northwestern Nevada has relentlessly pursued the forfeiture of surface water rights held by farmers in the Newlands Reclamation Project in the federal courts. The goal of the Tribe is to remove as much water from agricultural use as possible for return to Pyramid Lake. *See, e.g., Nevada v. United States, et al.*, 463 U.S. 110, 119, 103 S.Ct. 2906, 2912 (1982); *United States, et al. v. Alpine Land and Reservoir Co., Nevada State Engineer, et al.* (*Alpine VII*), 510 F.3d 1035, 1037 (9th Cir. 2007). If the Nevada Supreme Court's Order of Affirmance is allowed to stand, a new round of challenges to the Newlands farmers' use of groundwater will likely be spawned with the inevitable constitutional conflicts between

the decisions of the federal courts and the Nevada Supreme Court.

In *United States v. Orr Water Ditch Co.*, 256 F.3d 935, 941-942 (9th Cir. 2001), the Ninth Circuit Court of Appeals addressed the constitutionality of Nevada forfeiture statutes. The Court provided the following constitutional guidance at 256 F.3d 942, 943:

> For water-right holders whose rights had vested by 1913, or who had already initiated appropriations of their rights by that date, the new forfeiture statute could work unfairly because these holders had obtained or initiated appropriations of their rights on the understanding that those rights would not be subject to forfeiture. Indeed, with respect to those individuals, the statute could be more than just unfair; it could even be unconstitutional, for its removal of one stick from the bundle of sticks comprising a water right could be seen as an unconstitutional taking of property.
>
> * * *
>
> As we explained in *Alpine III* [983 F.2d 1487 (9th Cir. 1992)]:
>
> > According to the Nevada Supreme Court, the Nevada legislature included the provision exempting pre-1913 rights from impairment "to refrain from infringing upon rights which had accrued at that time, so as to avoid any question of the constitutionality of the Act." *Manse Springs*, 108 P.2d at 345.

The statute referred to, now codified as NRS 533.085 (App. 23-24), provides that "Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913." The statute is not susceptible to any other construction than that vested pre-1913 rights to the use of water are protected from impairment by forfeiture.

It is clear from the analysis provided in *United States, et al. v. Alpine Land and Reservoir Co., Nevada State Engineer, et al. (Alpine VI),* 340 F.3d 903, 914 (9th Cir. 2003), that forfeiture does not apply to either surface *or groundwater rights* that were vested prior to 1913. As was discussed, *supra*, the Schulz Family water rights were fully subject to the Act of March 22, 1913 and came squarely within the rule established by the Ninth Circuit Court of Appeals cases which, in turn, is consistent with the rule established in *Manse Springs*.

The Nevada Supreme Court's holding that the Schulz Family pre-1913 water rights are subject to forfeiture resulted in a direct conflict with decisions in the federal cases and throws into question settled expectations arising from such decisions. This Court should grant the writ prayed for herein to ensure that due respect for federal court decisions in state courts is required by basic notions of federalism, just as fundamental principles of federalism require the

national government to consult state processes and weigh state substantive law in shaping and defining a federal water policy. *See United States v. Alpine Land & Reservoir Co. (Alpine I)*, 697 F.2d 851, 858 (9th Cir. 1983); *see also, United States, et al. v. Alpine Land and Reservoir Co., Nevada State Engineer, et al. (Alpine VII), supra*, 510 F.3d at 1038.

4. The Nevada Supreme Court's Order of Affirmance Disregarded Numerous Federal Court Cases Which Applied Equitable Restraints Against Forfeiture where Continued Beneficial Use Was Thwarted by the State as the Taking Entity.

The Ninth Circuit Court of Appeals recognized in *Alpine VII, supra,* 510 F.3d at 1040, that the rules it had painstakingly developed, provided that where a water user that is the target of forfeiture provides evidence that steps were taken to transfer the water rights and that the attempt was unsuccessful because it was thwarted by government, then forfeiture would not apply. Three of the rules the Ninth Circuit Court of Appeals set forth in *Alpine VII, supra,* 510 F.3d at 1039, had to do with substantive due process equitable considerations to be applied in the forfeiture context:

> We will apply the following rules regarding forfeiture:
>
> (1) Steps were taken to transfer those rights during the period of nonuse that led

> to the forfeiture. *See Alpine VI*, 340 F.3d at 914; *Alpine V,* 291 F.3d at 1078; and
>
> (2) The applicant presented evidence that the attempt was unsuccessful or at least that upon inquiry about the possibility of a transfer the applicant was told by the government or TCID that such a transfer was not permitted (in other words, the transfer was thwarted by the governmental entity). *Alpine V,* 291 F.3d at 1078; *see also Alpine VI*, 340 F.3d at 914; and
>
> (3) The balance of hardships favors the applicant.

In *United States and Pyramid Lake Paiute Tribe of Indians v. Alpine Land and Reservoir Co. (Alpine V),* 291 F.3d 1076, 1077-1078 (2002) the Ninth Court of Appeals held with respect to forfeiture claims:

> Given that the law abhors a forfeiture, *see Town of Eureka,* 826 P.2d at 952, equity should operate in these limited situations to protect landowners.
>
> * * *
>
> . . . [E]quity may be appropriate on a case-by-case basis in the forfeiture context if a landowner can show that steps were taken to transfer water rights during the period of non-use, but that those steps were thwarted by the government or TCID.

In 1996, the Schulz Family filed transfer applications for a change in point of diversion with the State

Engineer agency, the Division of Water Resources, for use of their water rights on the same property for which the water had been appropriated. The Schulz Family applications were required to be acted upon within 6 months but were not. *See* NRS 533.370(3) (App. 25-27). The Schulz Family filed transfer applications on a second occasion in 2006 which have not been acted upon. App. 13. The State Engineer admitted in his Answer that the Schulz Family had filed applications to change their water rights and that they had not been acted upon, thus, the Schulz Family attempted transfer was thwarted by a governmental entity, the State Engineer. The Ninth Circuit Court of Appeals rules are clearly applicable to the Schulz Family groundwater rights.

The Nevada Supreme Court denied equitable consideration based upon the foregoing arguments in footnote 1 of its Order of Affirmance:

> Appellants argue that the district court erred by (1) failing to grant equitable relief. . . . After careful review, we conclude that these arguments lack merit.

App. 2-3.

Certiorari is appropriate to provide constitutional due process consistency between the decisions of the Ninth Circuit Court of Appeals and the Nevada Supreme Court just as certiorari would be appropriate to resolve a split in the circuit courts of appeals.

CONCLUSION

For the reasons contained herein, the Petitioners respectfully pray that a writ of certiorari issue.

Respectfully submitted,

HARRY W. SWAINSTON

Counsel for Petitioners

Dated this 30th day of November, 2010.

IN THE SUPREME COURT OF THE
STATE OF NEVADA

DONALD M. SCHULZ AND KATHLEEN E. SCHULZ, TRUSTEES OF 1980 SCHULZ LIVING TRUST AS AMENDED; MARGARET ANN SCHULZ LOH AND MARTIN J. SCHULZ, TRUSTEES OF THE LMA 1992 TRUST; AND MARTIN J. SCHULZ, TRUSTEE OF THE 1992 SMJ TRUST,

Appellants

vs.

TRACY TAYLOR, NEVADA STATE ENGINEER,

Respondent.

No. 53731

(Filed Jun. 22, 2010)

ORDER OF AFFIRMANCE

This is an appeal from a district court final order in a water law action. First Judicial District Court, Carson City; James Todd Russell, Judge.

Appellants Donald, Kathleen, Margaret and Martin Schulz sought to sell their groundwater rights to Carson City. Appellants applied to the Nevada Division of Water Resources to change the manner and place of use of their groundwater rights to effectuate the sale, but respondent, the State Engineer, did not act on their applications. Appellants filed a

complaint and moved for partial summary judgment, declaratory relief, and a writ of mandamus. The district court denied summary judgment and declaratory relief, but granted the writ of mandamus and directed the State Engineer to determine appellants' water rights. In its order, the district court also found that appellants' water rights might be subject to forfeiture under NRS 534.090(1), and that NRS 534.090(1) applies retroactively and is constitutional under *Town of Eureka v. State Engineer*, 108 Nev. 163, 826 P.2d 948 (1992). Appellants appealed in February 2008, but we dismissed the appeal for lack of jurisdiction due to a pending claim in district court. In April 2009, the district court dismissed that final claim, enabling appellants to file this appeal.

The parties are familiar with the facts and we do not recount them further except as necessary to our disposition.

DISCUSSION

Appellants argue that the district court erred in determining (1) that NRS 534.090(1) is retroactively applicable to its claimed groundwater rights, and (2) that NRS 534.090(1) is constitutional. We conclude that these arguments lack merit and affirm the decision of the district court.[1]

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[1] Appellants argue that the district court erred by (1) failing to grant equitable relief, (2) failing to consider issue preclusion, (3) failing to resolve the definitional ambiguities of NRS

(Continued on following page)

I. NRS 534.090(1) may be applied retroactively

A. Standard of review

Statutory construction is a matter of law. *Valdez v. Employers Ins. Co. of Nev.*, 123 Nev. 170, 174, 162 P.3d 148, 151 (2007). Courts shall review the retroactive application of a statute de novo. *Scott v. Boos*, 215 F.3d 940, 942 (9th Cir. 2000).

B. History of NRS 534.090(1)

Under Nevada's first comprehensive water law, enacted in 1913, if the owner of water rights failed to use his water beneficially for five successive years, the State could consider those rights abandoned and the owner would forfeit the rights. N.C.L. § 7897; *Town of Eureka*, 108 Nev. at 166, 826 P.2d at 950. In 1939, the Legislature enacted laws for the appropriation of groundwater for systems constructed after the 1913 act. N.C.L. §§ 7987-7993; *Town of Eureka*, 108 Nev. at 166, 826 P.2d at 950.

In 1947, the Legislature amended these prior acts, stating that five successive years of non-use of groundwater resulted in forfeiture of undetermined rights and abandonment of determined rights. N.C.L. § 1993.18a; *Town of Eureka*, 108 Nev. at 166, 826 P.2d

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534 090(1), and (4) directing the State Engineer to conduct forfeiture proceedings. Appellants also contend that NRS 534 090(1) affects an unconstitutional taking and is an unconstitutional bill of attainder. After careful review, we conclude that these arguments lack merit.

at 950. This section became NRS 534.090(1). *Id.* In 1967, the Legislature applied the forfeiture statute to all groundwater rights in existence by adding the language "whether such right be initiated after or before March 25, 1939." 1967 Nev. Stat., ch. 383, § 3, at 1053. The Legislature also eliminated any difference between undetermined and determined rights, making all groundwater subject to forfeiture. *Town of Eureka, 108 Nev.* at 167, 826 P.2d at 950..

In 1981, the Legislature stated that the required five-year period of non-use must begin after the 1967 retroactivity amendment. *Id.* This change "express[ed] the [L]egislature's intent that the statute apply retroactively to water rights present on April 15, 1967." *Id.*

C. Manse Spring and Town of Eureka

We considered the forfeiture of vested water rights in the cases of *In re Waters of Manse Spring*, 60 Nev. 280, 108 P.2d 311 (1940), and *Town of Eureka v. State Engineer*, 108 Nev. 163, 826 P.2d 948 (1992). Appellants rely on *Manse Spring* to support their argument that NRS 534.090(1) does not apply retroactively because their claimed groundwater rights vested prior to 1913. We disagree.

In *Manse Spring*, we considered the earliest form of the forfeiture statute, which did not make specifications for groundwater. *Id.* at 285-86, 108 P.2d at 314. We held that subjecting water rights acquired before 1913 to forfeiture would impair those rights, in

violation of a protective measure stating that vested rights should not be impaired by provisions of the water act. *Id.* at 289, 108 P.2d at 315-16. Accordingly, "rights acquired before 1913 could only be lost in accordance with the law in existence at the time of the enactment of said 1913 statute, namely, intentional abandonment." *Id.* at 289, 108 P.2d at 316.

Since the decision in *Manse Spring*, the Nevada Legislature enacted the previously mentioned amendments to the original 1913 water law. We considered the effect of these amendments in *Town of Eureka*. There, the State Engineer determined that the town, which sought to change the use of its water, forfeited some of the water through non-use of a predecessor under a retroactive application of NRS 534.090(1). *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949. Even though the town argued that its rights had vested prior to 1913, and should be protected under the rule of *Manse Spring*, the district court concluded that NRS 534.090(1) was constitutional and as applied retroactively, could forfeit the town's water rights. *Id.*

After a comprehensive review of the 1947, 1967, and 1981 amendments, we held that the Legislature expressed intent "that the statute apply retroactively to water rights present on April 15, 1967." *Town of Eureka*, 108 Nev. at 167, 826 P.2d at 950. We distinguished *Manse Spring* because that case involved non-use of prestatutory surface water rights. *Id.* at 168, 826 P.2d at 951. Also, contrary to the 1913 statute considered in *Manse Spring*, the Legislature

now "has affirmatively stated that the forfeiture provision enacted in 1967 applies to all groundwater rights, even those in existence at the time of enactment." *Id.*

Appellants attempt to distinguish *Town of Eureka* from their claimed groundwater rights because, in that case, the town held permitted groundwater rights instead of pre-1913 vested groundwater rights. However, as we explained, "[v]ested water rights are those already established either through diversion and beneficial use or through a state permit." *Id.* at 167, 826 P.2d at 951. NRS 534.090(1) makes no distinction between how groundwater rights became vested for the purposes of forfeiture. In 1981, the Legislature affirmatively stated that the 1967 forfeiture provision applies to all groundwater rights, regardless of when or in what manner acquired. 1981 Nev. Stat., ch. 736, § 7, at 1842. We conclude that the district court properly determined that appellants' claimed groundwater rights may be subject to forfeiture pursuant to the legislative amendments of NRS 534.090(1) and our holding in *Town of Eureka*, and a retroactive application of NRS 534.090(1) was not in error.

II. NRS 534.090(1) is constitutional as retroactively applied

A. Standard of review

This court reviews the constitutionality of statutes de novo. *Douglas Disposal, Inc. v. Wee Haul,*

LLC, 123 Nev. 552, 557, 170 P.3d 508, 512 (2007). Statutes are presumed to be valid, and the burden to demonstrate unconstitutionality is on the challenger. *Id.* When legislative enactments do not impinge on fundamental rights or affect a suspect class, they only violate due process and equal protection if they are not rationally related to legitimate government purpose. *Arata v. Faubion*, 123 Nev. 153, 159, 161 P.3d 244, 248 (2007). *Tarango v. SIIS*, 117 Nev. 444, 454, 25 P.3d 175, 182 (2001). Courts generally do not consider water rights to be subject to strict scrutiny. *See Foothills of Fernley, LLC v. City of Fernley*, No. 3:06-CV-00411-BES-VPC, 2008 WL 819997, at *5 (D. Nev. Mar. 21, 2008) (deciding the maintenance of city's water supply is a legitimate government purpose and reviewing an equal protection challenge regarding dedication of water rights under the rational basis test); *see also Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234-37 (9th Cir. 1994) (upholding a temporary water moratorium under the rational basis test); *Matter of Yellowstone River*, 832 P.2d 1210, 1217 (Mont. 1992) (holding that statutes under state's regulatory power concerning water rights must be reasonably related to legislative objectives to satisfy due process).

B. NRS 534.090(1) does not violate substantive due process

Appellants argue that a retroactive application of the forfeiture statute is not a constitutionally valid

exercise of police power denying appellants due process. We disagree.

The Due Process Clause of the Fourteenth Amendment prevents "retrospective laws from divesting vested rights." *Town of Eureka*, 108 Nev. at 167, 826 P.2d at 950. In *Town of Eureka*, we stated that the constitutionality of retroactive application of a law depended on "a balance between vested property rights and the police power of the State. Water rights are subject to regulation under the police power as is necessary for the general welfare." *Id.*

In Nevada, "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water." NRS 533.035. The preeminent public policy concerning water rights is beneficial use because water remains a limited resource that belongs to the public. *Preferred Equities v. State Engineer*, 119 Nev. 384, 389, 75 P.3d 380, 383 (2003). The State has the power to prescribe how the water may be used. *Town of Eureka*, 108 Nev. at 167, 826 P.2d at 950.

Appellants dispute that beneficial use is a sufficient public policy interest, given that the Legislature exempted surface water from forfeiture in 1999. NRS 533.060(2). However, beneficial use still remains the preeminent public policy concerning groundwater forfeiture. NRS 534.090(1). This change by the Legislature regarding surface water was not a repeal of beneficial use as the preeminent public policy regarding water in Nevada. *See* NRS 533.035; NRS

534.090(1). The statute is rationally related to the legitimate government interest of regulating a limited natural resource to its active beneficial uses and does not violate appellants' due process rights.

C. NRS 534.090(1) does not violate equal protection

Appellants also argue that because the Legislature exempted surface water from forfeiture, NRS 534.090(1) now violates equal protection by subjecting groundwater to potential forfeiture. We disagree.

The Equal Protection Clause of the Fourteenth Amendment guarantees people equal protection of the laws. U.S. Const. Amend. XIV, § 1. The two classes of similarly situated people that the law purports to treat differently are holders of a vested surface water right and holders of a vested groundwater right. *See* NRS 533.060(2); NRS 534.090(1).

The legislative history from Assembly Bill 380, which amended NRS 533.060(2), explains the reasons for a difference between surface water and groundwater in the forfeiture context. *See* Hearing on A.B. 380 Before the Assembly Natural Resources, Agricultural, and Mining Comm., 70th Leg. (Nev., March 10, 1999). The statute for groundwater has been amended several times since its implementation and contains a process for forfeiture, including notice by the State Engineer after four successive years of non-use. NRS 534.090(1)-(2). The State Engineer explained that in

certain areas of Nevada, surface water can appear and disappear at different times, subjecting the water to periods of non-use. Hearing on A.B. 380 Before the Assembly Natural Resources, Agricultural, and Mining Comm., 70th Leg. (Nev., March 10, 1999). The testimony by the State Engineer regarding the potential loss of rights due to changing surface water conditions in different regions of Nevada demonstrates the rational basis for this classification. NRS 534.090(1) does not violate equal protection.

Accordingly, we ORDER the judgment of the district court AFFIRMED.

/s/ Parraguirre, C.J.
Parraguirre

/s/ Hardesty, J.
Hardesty

/s/ Douglas, J.
Douglas

/s/ Cherry, J.
Cherry

/s/ Saitta, J.
Saitta

/s/ Gibbons, J.
Gibbons

/s/ Pickering, J.
Pickering

cc: Hon. James Todd Russell, District Judge
Harry W. Swainston
Attorney General/Carson City
Carson City Clerk

Case No. 07-00854A

Dept. No. 1

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CARSON CITY

-o0o-

DONALD M. SCHULZ and KATHLEEN E. SCHULZ, trustees of 1980 Schulz Living Trust as amended; MARGARET ANN SCHULZ LOH and MARTIN J. SCHULZ, trustees of the LMA 1992 Trust; and MARTIN J. SCHULZ, trustee of the 1992 SMJ Trust,

Plaintiffs,

vs.

TRACY TAYLOR, Nevada State Engineer, and DOES 1-100,

Defendants.

ORDER GRANTING WRIT OF MANDAMUS AND DENYING MOTION FOR SUMMARY JUDGMENT AND DECLARATORY JUDGMENT

This matter is before this Court on Plaintiffs Motion for Partial Summary Judgment, Writ of Mandamus and Declaratory Relief filed on January 4, 2008. The Plaintiffs filed a supporting memorandum of points and authorities and the affidavit of Donald M. Schulz in support of their motion. The Defendant

filed an Opposition thereto on January 31, 2008, and Plaintiffs filed their Reply on February 12, 2008. A Request to Submit was filed on February 12, 2008. The Complaint filed by plaintiffs alleges that on October 20, 2005, Plaintiffs entered into a contract of sale of their vested groundwater rights with Carson City. Carson City agreed to purchase 611 acre feet of water rights owned by the Plaintiffs or a quantity approved for transfer by the State Engineer. The Board of Supervisors of Carson City approved the Water Purchase Agreement and a subdivision map for a 521-unit residential subdivision known as the Schulz Ranch development at the October 20, 2005 meeting of the Board. On November 3, 2005 the Carson City Board of Supervisors gave final approval of master-plan and zoning amendments which authorized the 521-unit Schulz Ranch residential subdivision.

In order to consummate their water purchase agreement, the plaintiffs filed on January 26, 2006 applications to change the manner and place of use of their asserted ground water rights. Plaintiffs allege that these applications were ready for action on November 4, 2006. The Defendant State Engineer has not approved the applications in issue at this time or acted upon these applications. Apparently, no adjudication is planned for the underground water basin, where Plaintiffs rights are asserted, at this time.

Initially, it is important to note that the State of Nevada has designated the State Engineer to adjudicate and administer the provision of Chapter 534 of

the Nevada Revised Statutes concerning underground water rights in the State of Nevada. *See* NRS 534.020, NRS 534.030, NRS 534.100 and NRS 534.110. Therefore, it is incumbent upon the Plaintiffs to follow the procedure set forth in Chapter 534 of the Nevada Revised Statutes as to the adjudication of their water rights. NRS 533.370(2) sets forth the requirement that the State Engineer shall approve or reject each application within one year after the final date for filing a protest. Although there are certain exceptions set forth in NRS 533.370, it appears to this Court that the Plaintiffs are entitled to action on their applications. Given the inaction by the State Engineer, Plaintiffs' request for a writ of mandamus which mandates and directs the State Engineer to commence an administrative proceeding to produce an order of determination in accordance with the provisions in NRS 534.100, setting forth the Plaintiffs' relative rights to the use of groundwater in a designated area, is appropriate. The Court notes that the State Engineer in its Opposition has indicated his willingness to begin adjudication of the Plaintiffs' water rights.

A writ of mandamus is an appropriate remedy where the exercise of a duty is established by statute but the official refuses to perform the duty. NRS 34.160 provides with respect to a writ of mandamus:

> The writ may be issued by the Supreme Court, a district court or a judge of the district court, to compel the performance of an act which the law especially enjoins as a

> duty resulting from an office, trust or station; or to compel the admission of a party to the unlawfully precluded by such inferior tribunal, corporation, board or person. When issued by a district court or a judge of the district court it shall be made returnable before the district court.

The obligation of the State Engineer to act upon the applications filed by Petitioners is required by law and as such mandamus is an appropriate remedy given the lack of a plain, speedy and adequate remedy in the ordinary course of law to the Plaintiffs. Further, the Plaintiffs are entitled to a determination on their applications within a reasonable period of time. This is not a discretionary action by the State Engineer, but a ministerial obligation that needs to be performed. *Borge v. Dist. Ct.*, 120 Nev. 1021, 1025; 102 P.3d 600 (2004); *Mineral County v. State, Dep't of Conserv.*, 117 Nev. 235, 242; 20 P.3d 800 (2001); *State Bar of Nevada v. List*, 97 Nev. 367, 368; 632 P.2d 341 (1981); *Round Hill Gen. Imp. Dist. v. Newman,* 97 Nev. 601, 602; 637 P.2d 534 (1981). *Southwest Gas Corp. v. Public Serv. Comm'n.*, 92 Nev. 48, 54; 546 P.2d 219 (1976). The cases of Mineral County v. State, Dep't of Conserv. and Round Hill Gen. Imp. Dist. v. Newman are both distinguished based on the failure of the State Engineer in this case to act on the applications as required by NRS 533.370.

NRS 534.100(2) provides that the State Engineer has the power to designate an area which may include other claimed underground vested water rights

and proceed with adjudicating such rights as provided for in Chapter 533 of NRS. The Plaintiffs' have presented an actionable cause of action under the facts and circumstances of this case and the State Engineer has the duty to proceed as provided for in NRS 534.100(2), which provides:

> 2. Any claimant of a vested underground water right may petition the State Engineer to adjudicate such rights. If upon investigation he finds the facts and conditions justify it, he shall enter an order granting the petition and shall make proper arrangements to proceed with such determination. In the order the State Engineer shall designate the area within which such determination is to be made, but the size of such designated area may include other claimed underground vested water rights. Such designated area shall not extend into other drainage basins. Following the designation of such area the State engineer shall proceed with adjudication such rights as provided for in chapter 533 of NRS.

As to arguments pertaining to the retroactive application of NRS 534.090 and its constitutionality. These issues were addressed by the Nevada Supreme Court in *Town of Eureka v. State Engineer*, 108 Nev. 163, 168; 826 P.2d 948 (1992). The Nevada Supreme Court stated that "Finally, contrary to the 1913 water law, the legislature has affirmatively stated that the forfeiture provision enacted in 1967 applies to all groundwater rights, even those in existence at the

time of enactment. We agree with the district court that the legislature's affirmative statement that the law shall be retroactive is constitutional." *Town of Eureka* at 168 supra.

A distinction in NRS 534.090 that is important is that while the legislature applied the law retroactively to existing water rights, it only applied the Statute to prospective conduct, i.e. the non-use of water after 1967. Thus, the changes did not divest any water rights theretofore not used prior to 1967, but put water right holders on notice that they must use their water rights beneficially or lose them for others to appropriate.

The Supreme Court has held that,

> The preeminent public policy concern in Nevada regarding water rights is beneficial use. Appellant did not make beneficial use of its water while it held its rights. The legislature has recognized that water is a limited resource in Nevada and it belongs to the public; therefore, one who does not put it to a beneficial use should not be allowed to hold it hostage.

Preferred Equities Corp. v. State Engineer, 119 Nev. 384, 389; 75 P.3d 380, 383 (2003). *See also*: NRS 534.020(1).

The Motion for Partial Summary judgment is inappropriate at this time given the need for the State Engineer to make a determination on the applications of the Plaintiffs. The Plaintiffs need to

first go through the administrative process which has been established. *See*, *Allstate Insurance Company vs. Ted Thorpe*, 123 Nev. ___, 170 P.3d 989, 993 (2007). In the event the Plaintiffs disagree with that determination, the appropriate relief available is a Petition for Judicial Review to this Court. *See* NRS 533.450. *Kay v. Nunez,* 122 Nev. ___; 146 P.3d 801, 805 (2006).

THEREFORE, good cause appearing, a writ of mandamus shall issue, made returnable to this court on or before September 1, 2008, which mandates that the State Engineer, Tracy Taylor, produce an order of determination of the relative rights to the groundwater in an area that encompasses the point of diversion of Plaintiffs' asserted vested groundwater rights and provide appropriate notice to potential claimants in such area. Further, the State Engineer shall file the order of determination with the Court under the number and caption of this case for further proceedings before the Court. Included in its order of determination, the State Engineer shall determine the validity of the water rights being asserted by Plaintiffs, the amount of the water right Plaintiffs are entitled to, the priority of the water right, and whether the water right if vested has been abandoned or forfeited under the provisions of NRS 534.090. In the event the State Engineer needs in good faith an extension of time beyond September 1, 2008 to issue his order of determination, he may apply to this Court for an extension of time.

THEREFORE, good cause appearing, the Plaintiffs are not entitled to a declaratory judgment or a

partial summary judgment that declares that the provisions of NRS 534.090(1) inapplicable to their asserted water rights.

DATED this 14th day of February, 2008.

/s/ James T. Russell
JAMES T. RUSSELL
District Judge

The undersigned, an employee of the District Judge, hereby certifies that on the 14th day of February, 2008, I served the foregoing by depositing a copy thereof in the U.S. Mail at Carson City, Nevada, postage paid, addressed as follows:

Harry W. Swainston, Esq.
4040 Hobart Road
Carson City, NV 89703

Bryan L. Stockton
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701

/s/ Jeri Mihelic
JERI MIHELIC,
Judicial Assistant, Dept I

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD M. SCHULZ and KATHLEEN E. SCHULZ, trustees of 1980 Schulz Living Trust as amended; MARGARET ANN SCHULZ LOH and MARTIN J. SCHULZ, trustees of the LMA 1992 Trust; and MARTIN J. SCHULZ, trustee of the 1992 SMJ Trust,

Appellants,

vs.

TRACY TAYLOR, Nevada State Engineer,

Respondent.

No. 53731

(Filed Sep. 3, 2010)

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Parraguirre, C.J.
Parraguirre

/s/ Hardesty, J.
Hardesty

/s/ Douglas, J.
Douglas

/s/ Cherry, J.
Cherry

/s/ Saitta, J.
Saitta

/s/ Gibbons, J.
Gibbons

/s/ Pickering, J.
Pickering

cc: Hon. James Todd Russell, District Judge
Harry W. Swainston
Attorney General/Carson City
Carson City Clerk

NEVADA STATUTORY PROVISIONS:

NRS 533.035 Beneficial use shall be the basis, the measure and the limit of the right to the use of water.

[3:140:1913; 1919 RL p. 3225; NCL § 7892]

NRS 533.040 Water used for beneficial purposes to remain appurtenant to place of use; exceptions.

1. . . . .

2. If at any time it is impracticable to use water beneficially or economically at the place to which it is appurtenant, the right may be severed from the place of use and be simultaneously transferred and become appurtenant to another place of use, in the manner provided in this chapter, without losing priority of right.

3. . . . .

4. . . . .

5. . . . .

6. . . . .

7. . . . .

[4:140:1913; 1919 RL p. 3225; NCL § 7893] – (NRS A *1999, 2630*; *2003, 3410*)

NRS 533.060 Right to use limited to amount necessary; loss or abandonment of rights; no acquisition of prescriptive right; reservation of rights by State.

1. . . . .

2. Rights to the use of surface water shall not be deemed to be lost or otherwise forfeited for the failure to use the water therefrom for a beneficial purpose.

3. A surface water right that is appurtenant to land formerly used primarily for agricultural purposes is not subject to a determination of abandonment if the surface water right:

(a) Is appurtenant to land that has been converted to urban use; or

(b) Has been dedicated to or acquired by a water purveyor, public utility or public body for municipal use.

4. . . . .

5. . . . .

6. . . . .

[8:140:1913; A 1917, 353; 1949, 102; 1943 NCL § 7897] – (NRS A 1979, 1161; *1999, 2631*)

NRS 533.085 Vested rights to water not impaired.

1. Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

2. Any and all appropriations based upon applications and permits on file in the Office of the State Engineer on March 22, 1913, shall be perfected in accordance with the laws in force at the time of their filing.

[84:140:1913; 1919 RL p. 3247; NCL § 7970]

NRS 533.325 Application to State Engineer for permit. Any person who wishes to appropriate any of the public waters, or to change the place of diversion, manner of use or place of use of water already appropriated, shall, before performing any work in connection with such appropriation, change in place of diversion or change in manner or place of use, apply to the State Engineer for a permit to do so.

[Part 59:140:1913; A 1919, 71; 1951, 132] – (NRS A 1991, 859)

NRS 533.345 Application for permit to change place of diversion, manner of use or place of use: Contents; approval of or hearing on temporary change; period of temporary change.

1. Every application for a permit to change the place of diversion, manner of use or place of use of water already appropriated must contain such information as may be necessary to a full understanding of the proposed change, as may be required by the State Engineer.

2. If an applicant is seeking a temporary change of place of diversion, manner of use or place of use of water already appropriated, the State Engineer shall approve the application if:

(a) The application is accompanied by the prescribed fees;

(b) The temporary change is in the public interest; and

(c) The temporary change does not impair the water rights held by other persons.

3. If the State Engineer determines that the temporary change may not be in the public interest, or may impair the water rights held by other persons, he shall give notice of the application as provided in *NRS 533.360* and hold a hearing and render a decision as provided in this chapter.

4. A temporary change may be granted for any period not to exceed 1 year.

[Part 59:140:1913; A 1919, 71; 1951, 132] – (NRS A 1989, 318)

NRS 533.370 Approval or rejection of application by State Engineer: Conditions; exceptions; considerations; procedure.

1. . . . .

2. . . . .

3. Except as otherwise provided in subsection 8, the State Engineer shall approve or reject, within 6 months after the final date for filing a protest, an application filed to change the point of diversion of water already appropriated when the existing and proposed points of diversion are on the same property for which the water has already been appropriated under the existing water right or the proposed point of diversion is on real property that is proven to be owned by the applicant and is contiguous to the place of use of the existing water right. The State Engineer may:

(a) Postpone action upon written authorization to do so by the applicant or, if the application is protested, by the protestant and the applicant.

(b) In areas where studies of water supplies have been determined to be necessary by the State Engineer pursuant to NRS 533.368 or where court actions are pending, withhold action until it is determined there is unappropriated water or the court action becomes final.

4. . . .

5. . . .

6. . . .

7. . . .

8. . . .

9. . . . .

10. . . . .

[63:140:1913; A 1945, 87; 1947, 777; 1949, 102; 1943 NCL § 7948] – (NRS A 1959, 554; 1973, 865, 1603; 1977, 1171; 1981, 209, 359; 1989, 319; 1991, 759, 1369; 1993, 1459, 2082, 2349; 1995, 319, 697, 2523; 1999, 1045; 2001, 552; 2003, 2980; 2005, 2561

NRS 533.450 Orders and decisions of State Engineer subject to judicial review; procedure; motions for stay; appeals; appearance by Attorney General.

1. Any person feeling aggrieved by any order or decision of the State Engineer, acting in person or through the assistants of the State Engineer or the water commissioner, affecting the person's interests, when the order or decision relates to the administration of determined rights or is made pursuant to NRS 533.270 to 533.445, inclusive, or NRS 533.481, 534.193, 535.200 or 536.200, may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal, which must be initiated in the proper court of the county in which the matters affected or a portion thereof are situated, but on stream systems where a decree of court has been entered, the action must be initiated in the court that entered the decree. The order or decision of the State Engineer remains in full force and effect unless proceedings to review the same are commenced in the proper court within 30 days after the rendition of the

order or decision in question and notice thereof is given to the State Engineer as provided in subsection 3.

2. The proceedings in every case must be heard by the court, and must be informal and summary, but full opportunity to be heard must be had before judgment is pronounced.

3. No such proceedings may be entertained unless notice thereof, containing a statement of the substance of the order or decision complained of, and of the manner in which the same injuriously affects the petitioner's interests, has been served upon the State Engineer, personally or by registered or certified mail, at the Office of the State Engineer at the State Capital within 30 days following the rendition of the order or decision in question. A similar notice must also be served personally or by registered or certified mail upon the person who may have been affected by the order or decision.

4. Where evidence has been filed with, or testimony taken before, the State Engineer, a transcribed copy thereof, or of any specific part of the same, duly certified as a true and correct transcript in the manner provided by law, must be received in evidence with the same effect as if the reporter were present and testified to the facts so certified. A copy of the transcript must be furnished on demand, at actual cost, to any person affected by the order or decision, and to all other persons on payment of a reasonable amount therefor, to be fixed by the State Engineer.

5. An order or decision of the State Engineer must not be stayed unless the petitioner files a written motion for a stay with the court and serves the motion personally or by registered or certified mail upon the State Engineer, the applicant or other real party in interest and each party of record within 10 days after the petitioner files the petition for judicial review. Any party may oppose the motion and the petitioner may reply to any such opposition. In determining whether to grant or deny the motion for a stay, the court shall consider:

(a) Whether any nonmoving party to the proceeding may incur any harm or hardship if the stay is granted;

(b) Whether the petitioner may incur any irreparable harm if the stay is denied;

(c) The likelihood of success of the petitioner on the merits; and

(d) Any potential harm to the members of the public if the stay is granted.

6. Except as otherwise provided in this subsection, the petitioner must file a bond in an amount determined by the court, with sureties satisfactory to the court and conditioned in the manner specified by the court. The bond must be filed within 5 days after the court determines the amount of the bond pursuant to this subsection. If the petitioner fails to file the bond within that period, the stay is automatically denied. A bond must not be required for a public

agency of this State or a political subdivision of this State.

7. Costs must be paid as in civil cases brought in the district court, except by the State Engineer or the State.

8. The practice in civil cases applies to the informal and summary character of such proceedings, as provided in this section.

9. Appeals may be taken to the Supreme Court from the judgment of the district court in the same manner as in other civil cases.

10. The decision of the State Engineer is prima facie correct, and the burden of proof is upon the party attacking the same.

11. Whenever it appears to the State Engineer that any litigation, whether now pending or hereafter brought, may adversely affect the rights of the public in water, the State Engineer shall request the Attorney General to appear and protect the interests of the State.

[75:140:1913; A 1915, 378; 1951, 132] – (NRS A 1957, 532; 1969, 95; 1977, 426; 2007, 2019; 2009, 647)

NRS 534.090 Forfeiture and abandonment of rights.

1. Except as otherwise provided in this section, failure for 5 successive years after April 15, 1967, on the part of the holder of any right, whether it is an

adjudicated right, an unadjudicated right, or a permitted right, and further whether the right is initiated after or before March 25, 1939, to use beneficially all or any part of the underground water for the purpose for which the right is acquired or claimed, works a forfeiture of both undetermined rights and determined rights to the use of that water to the extent of the nonuse. For water rights in basins for which the State Engineer keeps pumping records, if the records of the State Engineer indicate at least 4 consecutive years, but less than 5 consecutive years, of nonuse of all or any part of such a water right which is governed by this chapter, the State Engineer shall notify the owner of the water right, as determined in the records of the Office of the State Engineer, by registered or certified mail that he has 1 year after the date of the notice in which to use the water right beneficially and to provide proof of such use to the State Engineer or apply for relief pursuant to subsection 2 to avoid forfeiting the water right. If, after 1 year after the date of the notice, proof of beneficial use is not sent to the State Engineer, the State Engineer shall, unless he has granted a request to extend the time necessary to work a forfeiture of the water right, declare the right forfeited within 30 days. Upon the forfeiture of a right to the use of groundwater, the water reverts to the public and is available for further appropriation, subject to existing rights. If, upon notice by registered or certified mail to the owner of record whose right has been declared forfeited, the owner of record fails to appeal the ruling in the manner provided for in NRS 533.450, and within the

time provided for therein, the forfeiture becomes final. The failure to receive a notice pursuant to this subsection does not nullify the forfeiture or extend the time necessary to work the forfeiture of a water right.

2. The State Engineer may, upon the request of the holder of any right described in subsection 1, extend the time necessary to work a forfeiture under that subsection if the request is made before the expiration of the time necessary to work a forfeiture. The State Engineer may grant, upon request and for good cause shown, any number of extensions, but a single extension must not exceed 1 year. In determining whether to grant or deny a request, the State Engineer shall, among other reasons, consider:

(a) Whether the holder has shown good cause for his failure to use all or any part of the water beneficially for the purpose for which his right is acquired or claimed;

(b) The unavailability of water to put to a beneficial use which is beyond the control of the holder;

(c) Any economic conditions or natural disasters which made the holder unable to put the water to that use;

(d) Any prolonged period in which precipitation in the basin where the water right is located is below the average for that basin or in which indexes that

measure soil moisture show that a deficit in soil moisture has occurred in that basin; and

(e) Whether the holder has demonstrated efficient ways of using the water for agricultural purposes, such as center-pivot irrigation.

The State Engineer shall notify, by registered or certified mail, the owner of the water right, as determined in the records of the Office of the State Engineer, of whether he has granted or denied the holder's request for an extension pursuant to this subsection.

3. . . . .

4. . . . .

[9a:178:1939; added 1947, 52; 1943 NCL § 7993.18a] – (NRS A 1967, 193, 1053; 1981, 1842; 1983, 1650; 1995, 1016; 2003, 651)

NRS 534.100 Recognition of existing water rights; classification of water in definable aquifer or percolating water by State Engineer; adjudication of vested underground water rights.

1. Existing water rights to the use of underground water are hereby recognized. For the purpose of this chapter a vested right is a water right on underground water acquired from an artesian or definable aquifer prior to March 22, 1913, and an underground water right on percolating water, the course and boundaries of which are incapable of determination, acquired prior to March 25, 1939. The

distinction as to whether water is in a definable aquifer or whether it is percolating water, the course and boundaries of which are incapable of determination, is a matter to be determined by the State Engineer.

2. Any claimant of a vested underground water right may petition the State Engineer to adjudicate such rights. If upon investigation he finds the facts and conditions justify it, he shall enter an order granting the petition and shall make proper arrangements to proceed with such determination. In the order the State Engineer shall designate the area within which such determination is to be made, but the size of such designated area may include other claimed underground vested water rights. Such designated area shall not extend into other drainage basins. Following the designation of such area the State Engineer shall proceed with adjudicating such rights as provided for in chapter 533 of NRS.

[9a:178:1939; added 1947, 52; 1943 NCL § 7993.18b] – (NRS A 1957, 718)

Section 8 of the Act of 1913, N.C.L. §7897

Rights to the use of water shall be limited and restricted to so much thereof as may be necessary, when reasonably and economically used for irrigation and other beneficial purposes, irrespective of the carrying capacity of the ditch; and all the balance of the water not so appropriated shall be allowed to flow in the natural stream from which such ditch draws

its supply of water, and shall not be considered as having been appropriated thereby; and in case the owner or owners of any such ditch, canal or reservoir shall fail to use the water therefrom for beneficial purposes for which right exists during any five successive years, the right to use shall be considered as having been abandoned, and they shall forfeit all water rights, easements and privileges appurtenant thereto, and the water formerly appropriated by them may be again appropriated for beneficial use, the same as if such ditch, canal or reservoir had never been constructed.

Section 84 of the Act of 1913, N.C.L.§7970

Nothing in this act contained shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this act where appropriations have been initiated in accordance with law prior to the approval of this act. Any and all appropriations based upon applications and permits now on file in the state engineer's office, shall be perfected in accordance with the laws in force at the time of their filing.